

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES H. FISHER,

Plaintiff,

No. CIV S-05-0540 MCE EFB P

vs.

N. DIZON, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a prisoner without counsel suing for alleged civil rights violations. *See* 42 U.S.C. § 1983. Currently before the court is defendants' February 2, 2007, motion for summary judgment. Plaintiff has filed an opposition.

Plaintiff's March 31, 2005, verified complaint alleges that defendants violated his Eighth Amendment rights based on the following allegations: (1) on March 4, 2004, at around 12:30 a.m., Dizon and other guards awoke plaintiff and flung pocket knives in the area of plaintiff's bed; (2) on March 4, 2004, at around 4:30 a.m., defendants Dizon and Powers returned to plaintiff's bunk, awoke him and flung pocket knives in the area of plaintiff's bed; (3) at around 12:35 a.m., on March 5, 2004, Dizon approached plaintiff's bunk, shone a light in plaintiff's eyes, held a knife over plaintiff's head, shook the bunk and poked plaintiff twice in the buttocks; (4) at around 4:30 a.m. on March 5, 2004, plaintiff complained about Dizon to defendant

1 Powers, who refused to take action to protect plaintiff from Dizon; and, (5) nine days later, on
2 March 14, 2004, defendant Dizon assaulted and battered plaintiff with the assistance of
3 Anunciacion, Barrientos, Mendoza, Rosales and Swan, causing plaintiff to suffer bruises and
4 cuts.

5 Defendants contend that plaintiff cannot produce evidence to create a genuine issue for
6 trial as to whether they used excessive force. For the reasons explained below, the court finds
7 that with respect to the first two claims, there is no genuine issue for trial. With respect to the
8 other three claims, plaintiff has established a genuine issue of material fact as to the claims
9 against Dizon and Powers.

10 **I. Plaintiff's Rule 56(f) Request**

11 Plaintiff seeks additional time for discovery. Pl.'s Opp'n, at 3. Although he states that
12 he does not make this request pursuant to Rule 56(f), that rule governs a request to postpone
13 summary judgment to permit a party to conduct additional discovery. Plaintiff asserts that
14 defendants' counsel did not produce documents that plaintiff duly requested. He asserts that
15 these records will show that other prisoners and civilians have filed complaints against
16 defendants alleging acts of violence, retaliation and the falsification of records. *Id.*, at 4.
17 Plaintiff states that defendant Powers was demoted shortly after plaintiff filed a grievance about
18 the conduct he alleges in his complaint. *Id.*, at 4-5. He also asserts that the documents he seeks
19 will establish that defendants operate under a "Code of Silence." *Id.*, at 5.

20 As to the contention that other persons have filed complaints alleging retaliation, further
21 discovery by plaintiff to gather evidence to oppose this motion is unnecessary. The court finds
22 that the retaliation claim survives summary judgment.

23 As to the first two claims, plaintiff fails to satisfy the requirements of Rule 56 (f). A
24 court may deny a motion for summary judgment or postpone ruling on the motion to permit
25 further discovery when an opposing party shows by affidavit that it cannot present facts essential
26 to justify the party's opposition. Fed. R. Civ. P. 56(f). As the party opposing summary

1 judgment, plaintiff's burden to prevail on this motion is high:

2 Should it appear from the affidavits of a party opposing the motion that the party
3 cannot for reasons stated present by affidavit facts essential to justify the party's
4 opposition, the court may refuse the application for judgment or may order a
continuanace to permit affidavits to be obtained or depositions to be taken or
discovery to be had or may make such other order as is just.

5 Fed. R. Civ. P. 56(f). This standard requires the party seeking a continuance to "identify by
6 affidavit the specific facts that further discovery would reveal, and explain why those facts
7 would preclude summary judgment." *Tatum v. City and County of San Fransisco*, 441 F.3d
8 1090, 1100 (9th Cir. 2006). Plaintiff's request to continue summary judgment in order to permit
9 further discovery is not based on an affidavit. Furthermore, his reasons are too general. That
10 other people have complained about defendants is not a specific fact without which plaintiff
11 could not oppose defendants' motion. Rather, at best, it is character evidence with limited
12 admissibility at trial. Plaintiff has not show by affidavit what specific discovery he proposes and
13 how that discovery would lead to evidence which would satisfy his burden in opposing summary
14 judgment. Thus, plaintiff's Rule 56(f) request must be denied.

15 **II. Facts**

16 At all times relevant to this action, plaintiff was a prisoner confined at the California
17 Medical Facility ("CMF"), and housed in Dorm 1 in Unit H-3 with 11 other prisoners. Defs.'
18 Mot. for Summ. J., Exs. filed in Supp. Thereof ("Defs.' Ex."), Ex. A, Incident Report of
19 3/14/2004; Dizon Decl., ¶ 26. All defendants were employed at CMF. Defendants Dizon and
20 Anunciacion were first watch relief¹ officers in plaintiff's housing unit. Dizon Decl., ¶ 1-2;
21 Anunciacion Decl., ¶ 1-2. Defendant Rosales was the regular first watch officer on plaintiff's
22 housing unit. Rosales Decl., ¶ 2. Defendant Mendoza was a housing officer on Housing Wing
23 L-3. Mendoza Decl., ¶ 2. Swan was the first watch officer for the administrative segregation
24 unit. ¶ 2. Barrientos was a floor officer on plaintiff's housing unit. Barrientos Decl., ¶ 2-3.

25
26 ¹ A "relief officer" covers for a regular officer when the latter is not at work. Rosales
Decl., ¶ 3.

1 Defendants' motion necessitates some explanation of the process for counting prisoners.
2 Relevant here is the "positive count," i.e., counting "the actual number of inmates that each
3 respective staff member has counted and reported to Central Control." Defs.' Ex. B, CDCR
4 Departmental Operations Manual ("DOM") 520204.3. Prisoners must be counted at least four
5 times each day at times established in the DOM. DOM 52020.4. Thus, positive counts are to be
6 conducted between 12:30 a.m. and 1:00 a.m.; 4:30 a.m. and 5:30 a.m.; 4:00 p.m. and 5:00 p.m.;
7 and 9:00 p.m. and 10:00 p.m. DOM 52020.4.1. During what is known as a "standing count,"
8 which is done between 4:00 p.m. and 5:00 p.m., "inmates housed in cells shall stand upright at
9 their cell door and shall remain standing until counted by the officer conducting the count."
10 DOM 52020.4.2. Prisoners "housed in dormitories equipped with double tier bunks, shall
11 remain seated on their assigned bunk until the count is completed by the officer." DOM
12 52020.4.3. No document specifies when a count is "completed." However, defendants assert
13 that prisoners must remain on their bunks until guards finish counting and the last officer has left
14 the dormitory. Kaplan Decl., ¶ 10; Dizon Decl., ¶ 14. Guards counting prisoners must "ensure
15 that the individual inmate is awake, breathing and responsive." Defs.' Ex. C, California Medical
16 Facility Operational Procedure ("OP") 4, at 4. A prisoner will not be counted if staff is "unable
17 to confirm the inmate being counted is alive and breathing." OP 4, at 4.

18 Defendants submit evidence in the form of Dizon's declaration explaining the security
19 precautions taken during a positive count made on first watch. To count prisoners in a
20 dormitory, guards must enter the dormitory. One guard remains in the main hall outside the
21 housing wing. Dizon Decl., ¶ 9. The door leading into the housing wing remains locked, and
22 the "key" officer holds the keys for all the wings, dormitories and cells where prisoners are to be
23 counted. *Id.* To count the prisoners in a dormitory, the guard stationed in the hallway unlocks
24 the door to the dormitory, two to four guards enter, and the wing officer locks the door after
25 them. *Id.*, ¶ 10. One guard, the "wing officer," counts the prisoners while the other officers,
26 "cover officers," protect him. *Id.* Since it was dark in the dormitory, Dizon used a flashlight to

1 verify that each prisoner was present and alive, and while it was not his practice to shine the light
2 in a prisoner's eyes, it could have happened on occasion. *Id.*, ¶ 25. Dizon asserts that during
3 counts he does not touch a sleeping prisoner with his hand or any object because startling a
4 sleeping prisoner can lead to a dangerous incident. Dizon Decl., ¶ 24.

5 Compounding prison officials' concerns for security during a count was a habit of
6 prisoners, at the time of these events in dispute here, of hanging "curtains" on clotheslines
7 around their bunks. Dizon Decl., ¶¶ 15, 16; Rosales Decl., ¶ 13; Swan Decl., ¶ 11. This practice
8 required the wing officer to move whatever was hanging on the line. Dizon Decl., ¶ 15. Thus,
9 Sergeant Powers authorized guards to cut down curtains and clotheslines that hindered the ability
10 to count prisoners. *Id.*, at 17; Rosales Decl., ¶ 14; Swan Decl., ¶ 11. Dizon asserts that he
11 carried what is known as a "cut down tool," which he used for cutting curtains and clotheslines
12 to facilitate the count. *Id.*, at 18. A "cut down tool" has the shape of "a curved version of the
13 number six," and specifically is designed to cut a noose in order to prevent a suicide. *Id.* The
14 lower part of the tool is an oval-shaped handle of about 3/4 of an inch thick. *Id.* The top part is
15 curved, about 3/4 of an inch thick with "a razor-like device angled upward toward the center
16 inside curve of the top of the 'six.'" *Id.* This upper, sharp portion is used for cutting. *Id.* Dizon
17 denies ever having used anything other than a cut down tool to cut an prisoner's clothesline.
18 Dizon Decl., at ¶ 22. At deposition, plaintiff explained that the instrument was like a box
19 cutting tool. Defs.' Ex. G, Dep. of Plaintiff ("Pl.'s Dep."), at 14.

20 For the most part, defendant Dizon avoids the use of specific dates in his declaration. He
21 states that about a week before the March 14, 2004, incident, when Dizon cut plaintiff's
22 clothesline on which a sheet was hanging, plaintiff began pulling on the sheet. Dizon Decl., ¶
23 23. Dizon tugged back, but ultimately let go in order to avoid a violent incident. *Id.* That day,
24 plaintiff complained to Sgt. Powers about the what had happened. *Id.* Dizon denies knowing
25 who plaintiff was before this incident. *Id.*

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1 On March 4, 2004, during “first watch,” guards conducted two positive counts. Kaplan
2 Decl., ¶¶ 5-6. They completed the first count by approximately 1:00 a.m., and the second by
3 approximately 5:00 a.m. *Id.* In the verified complaint, plaintiff alleges that at around 12:30
4 a.m., he was awakened by unspecified staff “and Dizon wielding and flinging knives in my bed
5 area, and snatching on the bunk as they cut away my towel line.” Compl., at 4. At deposition he
6 retracted this allegation stating that Dizon did not thrust the knife. Pl.’s Dep., at 14. Rather,
7 Dizon “used the cutting knife on string. He cut away a string. He cut away a towel, my towel
8 string.” *Id.* Plaintiff admitted that at this time he did not see the cutting tool. *Id.*, at 17. He just
9 felt the bunk move when the string was cut away. *Id.* At 4:30 a.m., the same guards returned
10 with the sergeant, defendant Powers. *Id.* As they approached plaintiff’s bunk, Dizon pointed at
11 plaintiff and said, “That’s him.” Compl., at 5. Powers then took a knife out of his pocket and
12 cut a clothesline from plaintiff’s bunkmate’s bed with such force as to shake the entire bunk bed.
13 *Id.* Defendant Dizon does not specify a date, but does not dispute that at least once during
14 the first week of March 2004, he was working the first positive count of the first watch. Dizon
15 Decl., ¶ 23. He used a “cut down” tool to cut a clothesline on plaintiff’s bunk. Dizon Decl.,
16 ¶ 23; Swan Decl., ¶¶ 14-15. Plaintiff had hung a sheet on the line, and the sheet obstructed the
17 view of plaintiff’s bunk. Dizon Decl., ¶ 23; Swan Decl., ¶¶ 14-15. While Dizon was cutting the
18 sheet, plaintiff began to pull on it. Dixon Decl., ¶ 23; Swan Decl., ¶¶ 14-15. This continued so
19 that they essentially were in a tug-of-war. Eventually, Dizon let plaintiff have the sheet so as to
20 avoid having the situation escalate. Dixon Decl., ¶ 23; Swan Decl., ¶¶ 14-15. The court
21 construes these facts as pertaining to the first incident on March 4 because this was the only time
22 it appears that Dizon cut a clothesline attached to plaintiff’s bunk.

23 The verified complaint also alleges that on March 5, 2004, at around 12:35 a.m., Dizon
24 and other, unidentified guards returned. Compl., at 5. Plaintiff was awake. *Id.* His towel was
25 folded and on the floor. *Id.* He had nothing hanging up, but “Dizon walked up to my head area
26 and shined his high-intensity flash light directly into my eyes.” *Id.* Plaintiff blocked the light

1 with one hand. Dizon shook the bunk with the hand in which he was holding a knife. *Id.* Dizon
2 then went to the other side of the bunk, shook the bunk with both hands, poked plaintiff in the
3 buttocks and walked away. *Id.* Plaintiff asserts that the second poke “penetrated the crack and
4 cheeks” of his buttocks. Compl., at 6. At deposition, plaintiff testified that Dizon touched him
5 with some object, which could have been a baton or a flashlight. Pl.’s Dep., at 35.

6 Again, on March 14, 2004, during the first positive count on the first watch, Dizon cut
7 down a clothesline that was on plaintiff’s bed and told plaintiff that clotheslines were not
8 permitted. Dizon Decl., ¶ 28. Dizon asserts that thereafter, he stood near the restroom door,
9 which was about seven to ten feet from the door leading out of the dormitory. *Id.* The other
10 guards walked past him into the hallway. *Id.*, ¶ 29. Dizon ensured that all staff walked out the
11 door, and then he began to walk toward the door, looking behind him as he went. *Id.* Plaintiff
12 took hold of his cane and walked toward Dizon. *Id.*, ¶ 30; Compl., at 9. Rosales, the key person
13 during that count, saw plaintiff leave his bunk. Rosales Decl., ¶¶ 6, 7. Dizon twice ordered
14 plaintiff to stop. Dizon Decl., ¶ 30; Mendoza Decl., ¶¶ 7-8. Dizon thought that plaintiff was
15 upset because Dizon had cut his clothesline. Dizon Decl., ¶ 31. When plaintiff was about two
16 feet away from him, Dizon grabbed plaintiff. Dizon Decl., ¶ 33; Mendoza Decl., ¶ 8. Mendoza
17 heard a scuffle in the dormitory and ran inside, where he recovered a cut down tool one of the
18 other guards pushed across the floor away from the scuffle. Mendoza Decl., ¶¶ 7-8; Rosales
19 Decl., ¶ 9. Mendoza suggested removing plaintiff from the dorm. Mendoza Decl., ¶ 9; Dizon
20 Decl., ¶ 34. The other prisoners in the dormitory began to awaken and become agitated. Dizon
21 Decl., ¶ 35; Mendoza Decl., ¶ 9. As Dizon held plaintiff, who was the larger of the two, from
22 behind, plaintiff spun him around with such force that Dizon’s feet left the ground. Dizon Decl.,
23 ¶¶ 34, 36; Rosales Decl., ¶ 10. Dizon became caught in the utility belt of another guard, Rosales,
24 and broke Rosales’s radio holder. Dizon Decl., ¶ 36; Rosales Decl., ¶ 10. Dixon and Mendoza
25 maneuvered plaintiff out of the dormitory, and both plaintiff and Dizon fell to the ground. Dizon
26 Decl., ¶ 37; Mendoza Decl., ¶¶ 10, 12; Rosales Decl., ¶ 11. Another guard, Swan, was

1 performing a security check in a different unit when he saw the officers struggling with a
2 prisoner in plaintiff's unit. Swan Decl., ¶¶ 6-7. Swan ran into the main hallway, blew his
3 whistle and commanded Anunciacion to sound his alarm. *Id.* Mendoza saw a pen in plaintiff's
4 right hand, and ordered plaintiff to release it. Mendoza Decl., ¶ 12. Plaintiff did not obey the
5 order, and Mendoza pried the pen from his hand. *Id.* Other staff placed plaintiff into mechanical
6 restraints. Dizon Decl., ¶ 39; Defs.' Ex. A, Incident Report of 3/14/2004. Anunciacion denies
7 touching plaintiff on March 14, 2004. Anunciacion Decl., ¶7.

8 In contrast to defendants' version of events, the verified complaint alleges that Dizon and
9 others kicked his bunk during the count, and that after the guards, Dizon being the last, had left
10 the dormitory, plaintiff took his cane and started walking towards the bathroom. Compl., at 9.
11 He alleges that when he was about 3-5 feet from the bathroom, Dizon ran back into the
12 dormitory, stood by the bathroom door and commanded plaintiff to stop. *Id.* Plaintiff stopped,
13 Dizon then told the guard at the door to "hit his button," presumably the alarm, and grabbed
14 plaintiff's left arm. *Id.* Another guard grabbed plaintiff's right hand, and Dizon said they should
15 take plaintiff down in the hallway. *Id.* They carried plaintiff out the door, Dizon hit plaintiff in
16 the face, knocking off his glasses, and then grabbed plaintiff around the neck. *Id.* Plaintiff
17 obeyed a different officer's order to "just relax and go down." *Id.*, at 10. "Dizon then re-applied
18 his choke hold on me as someone was kicking me in the back and legs." *Id.* Ultimately, Dizon
19 released plaintiff on the command of a sergeant who is not a defendant in this action. *Id.*

20 The parties agree, however, that after plaintiff was restrained, guards took him to the
21 medical clinic. Rosales Decl., ¶ 15; Anunciacion Decl., ¶ 10. At this point, Rosales and
22 Anunciacion collected plaintiff's property, which was substantial. Rosales Decl., ¶ 15;
23 Anunciacion Decl., ¶ 10. These officers did not confiscate any of plaintiff's property, but items
24 such as empty body oil containers would have been considered garbage and been thrown away.
25 Rosales Decl., ¶ 16. Rosales, Barrientos, Anunciacion and Swan all categorically deny touching
26 plaintiff on March 14, 2004. Rosales Decl., ¶ 18; Barrientos Decl., ¶ 25; Anunciacion Decl., ¶ 7;

1 Swan Decl., ¶¶ 5-7, 9.

2 Plaintiff submits evidence in the form of a declaration by a fellow prisoner, Roderick
3 Green, that prisoners did move around once guards had finished counting but before they left the
4 dormitory. Mr. Green asserts that from about May 1, 2004, until October 14, 2004, he was
5 housed in the same unit as plaintiff. Pl.'s Opp'n, Ex. B, Green Decl., ¶ 1. When guards began to
6 count prisoners at about 12:30 a.m., he would walk to his bunk, and once he had been counted he
7 would go to another part of the dormitory or to the bathroom while the count continued. Green
8 Decl., ¶ 2. Guards never scolded Green or ordered Green back to his bunk, even when he
9 followed them to the door as they left. *Id.*, ¶¶ 4-5.

10 **II. Standards on Summary Judgment**

11 Summary judgment pursuant to Fed. R. Civ. P. 56(a) avoids unnecessary trials in cases
12 with no disputed material facts. *See Northwest Motorcycle Ass'n v. United States Dep't of*
13 *Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). At issue is "whether the evidence presents a
14 sufficient disagreement to require submission to a jury or whether it is so one-sided that one
15 party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52
16 (1986). Rule 56 serves to screen the latter cases from those which actually require resolution of
17 genuine disputes over facts material to the outcome of the case; e.g., issues that can only be
18 determined through presentation of testimony and evidence at trial such as credibility
19 determinations of conflicting testimony over dispositive facts.

20 In three recent cases, the Supreme Court, by clarifying what the
21 non-moving party must do to withstand a motion for summary
22 judgment, has increased the utility of summary judgment. First, the
23 Court has made clear that if the non-moving party will bear the
24 burden of proof at trial as to an element essential to its case, and
25 that party fails to make a showing sufficient to establish a genuine
26 dispute of fact with respect to the existence of that element, then
summary judgment is appropriate. *See Celotex Corp. v. Catrett*,
477 U.S. 317 (1986). Second, to withstand a motion for summary
judgment, the non-moving party must show that there are "genuine
factual issues that properly can be resolved only by a finder of fact
because they may reasonably be resolved in favor of either party."
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (emphasis

added). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). No longer can it be argued that *any disagreement* about a material issue of fact precludes the use of summary judgment.

California Arch. Bldg. Prod. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir.), *cert. denied*, 484 U.S. 1006 (1988) (parallel citations omitted) (emphasis added). In short, there is no "genuine issue as to material fact," if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Grimes v. City and Country of San Francisco*, 951 F.2d 236, 239 (9th Cir. 1991) (quoting *Celotex*, 477 U.S. at 322).

Thus, to overcome summary judgement an opposing party must show a dispute that is both genuine, and involving a fact that makes a difference in the outcome. Two steps are necessary. First, according to the substantive law, the court must determine what facts are material. Second, in light of the appropriate standard of proof, the court must determine whether material factual disputes require resolution at trial. *Id.*, at 248.

When the opposing party has the burden of proof on a dispositive issue at trial, the moving party need not produce evidence which negates the opponent's claim. *See e.g., Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990). The moving party need only point to matters which demonstrate the absence of a genuine material factual issue. *See Celotex v. Cattret*, 477 U.S. 317, 323-24 (1986).

If the moving party meets its burden, the burden shifts to the opposing party to establish genuine material factual issues. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 586.² The opposing party must demonstrate that the disputed facts are material, i.e., facts that might affect the

² On August 5, 2005, the court informed plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

1 outcome of the suit under the governing law, *see Anderson*, 477 U.S. at 248; *T.W. Elec. Serv., Inc.*
 2 *v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987), and that disputes are
 3 genuine, i.e., the parties’ differing versions of the truth require resolution at trial, *see T.W. Elec.*,
 4 809 F.2d at 631. There can be no genuine issue as to any material fact where there is a complete
 5 failure of proof as to an essential element of the nonmoving party's case because all other facts are
 6 thereby rendered immaterial. *Celotex*, 477 U.S. at 323. The opposing party may not rest upon the
 7 pleadings’ mere allegations or denials, but must present evidence of specific disputed facts. *See*
 8 *Anderson*, 477 U.S. at 248.³ Conclusory statements cannot defeat a properly supported summary
 9 judgment motion. *See Scott v. Rosenberg*, 702 F.2d 1263, 1271-72 (9th Cir. 1983).

10 The court does not determine witness credibility. It believes the opposing party’s
 11 evidence, and draws inferences most favorably for the opposing party. *See Anderson*, 477 U.S. at
 12 249, 255. Inferences, however, are not drawn out of “thin air,” and the proponent must adduce
 13 evidence of a factual predicate from which to draw inferences. *American Int’l Group, Inc. v.*
 14 *American Int’l Bank*, 926 F.2d 829, 836 (9th Cir.1991) (Kozinski, J., dissenting) (citing *Celotex*,
 15 477 U.S. at 322).

16 If reasonable minds could differ on material facts at issue, summary judgment is
 17 inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). On the other
 18 hand, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the
 19 nonmoving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citation
 20 omitted). In that case, the court must grant summary judgment.

21 With these standards in mind, it is important to note that plaintiff bears the burden of
 22 proof at trial over the issue raised on this motion, i.e., whether the defendant acted with deliberate
 23 indifference to the plaintiff’s safety. Equally critical is that “deliberate indifference” is an
 24

25 ³ A verified complaint may be used as an affidavit in opposition to the motion.
 26 *Schroeder v McDonald*, 55 F. 3d 454, 460 (9th Cir. 1995); *McElyea v. Babbitt*, 833 F.2d 196,
 197-98 (9th Cir. 1987) (per curiam).

1 essential element of plaintiff's cause of action. Therefore, to withstand defendant's motion,
2 plaintiff may not rest on the mere allegations or denials of his pleadings. He must demonstrate a
3 genuine issue for trial, *Valandingham v. Bojorquez*, 866 F.2d 1135, 1142 (9th Cir. 1989), and he
4 must do so with evidence upon which a fair-minded jury "could return a verdict for [him] on the
5 evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 252.

6 **III. Analysis**

7 "As to materiality, the substantive law will identify which facts are material. Only
8 disputes over facts that might affect the outcome of the suit under the governing law will properly
9 preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Here, plaintiff's action
10 arises under 42 U.S.C. Section 1983 and the Eighth Amendment. To prevail he must prove that
11 the defendant deprived him of his Eighth Amendment rights while acting under color of state law.
12 To prove that defendants used force that violated the Eighth Amendment, he must prove by a
13 preponderance of the evidence that they used force maliciously and sadistically solely for the
14 purpose of causing plaintiff physical harm. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992). As
15 discussed below, plaintiff has failed to demonstrate a genuine dispute for trial over this material
16 issue for his first two claims, but has demonstrated such a dispute with respect to his other claims.

17 As noted above, plaintiff alleges that at around on March 4, 2004 at 12:30 a.m., and
18 March 4, 2004, at 4:30 a.m., Dizon, Powers and other guards awoke plaintiff and flung pocket
19 knives in the area of plaintiff's bed. He claims that on March 5, 2004, at 12:35 a.m., Dizon shone
20 a light in plaintiff's eyes, held a knife over his head, shook the bunk and poked plaintiff twice in
21 the buttocks. He also claims that on March 5, 2004, at 4:30 a.m., he complained about Dizon to
22 defendant Powers, who refused to take action, and nine days later on March 14, 2004, defendant
23 Dizon assaulted and battered plaintiff with the assistance of Anunciacion, Barrientos, Mendoza,
24 Rosales and Swan, causing plaintiff to suffer bruises and cuts.

25 Harsh conditions of confinement, including the use of force, will not violate the Eighth
26 Amendment if the conditions are "part of the penalty that criminal offenders pay for their offenses

1 against society.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *Rhodes v. Chapman*, 452 U.S. 337,
2 347 (1981). Not every “malevolent touch by a prison guard” violates the Eighth Amendment.
3 *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Therefore, “*de minimis* uses of physical force” are
4 not unconstitutional unless it of a sort that is “repugnant to the conscience of mankind.” *Whitley*,
5 475 U.S. at 327. What violates the Eighth Amendment is “the unnecessary and wanton infliction
6 of pain,” i.e., infliction of suffering that is “totally without penological justification.” *Rhodes*,
7 452 U.S. at 346. Whether an Eighth Amendment violation has occurred depends upon the mental
8 state of the defendant together with objective indicia surrounding the condition or suffering
9 showing its relationship to the purpose of imprisonment. *Id.* The touchstone for any Eighth
10 Amendment analysis, however, is whether the condition can be said to run afoul of
11 “contemporary standards of decency.” *Rhodes*, 452 U.S. at 347. When force is used against a
12 prisoner, the question “whether the measure taken inflicted unnecessary and wanton pain and
13 suffering ultimately turns on whether force was applied in a good faith effort to maintain or
14 restore discipline or maliciously and sadistically for the very purpose of causing harm.” *Whitley*,
15 475 at 320-21; *see also Hudson*, 503 U.S. at 9. “When prison officials maliciously and
16 sadistically use force to cause harm, contemporary standards of decency always are violated,”
17 regardless of whether the resulting injury is significant. *Hudson*, at 9. In other words, “the use of
18 excessive physical force against a prisoner may constitute cruel and unusual punishment when the
19 inmate *does not suffer serious injury*.” *Hudson*, 503 U.S. at 4 (emphasis added). “Otherwise, the
20 Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman,
21 inflicting less than some arbitrary quantity of injury.” *Id.* Therefore, the extent of injury suffered
22 is just “one factor that may suggest whether the use of force could plausibly have been thought
23 necessary in a given situation, or instead evinced such wantonness with respect to the unjustified
24 infliction of harm as is tantamount to a knowing willingness that it occur.” *Id.*, at 7. When
25 determining whether the force used was excessive, the court must consider (1) the need to use
26 force, (2) the relationship between that need and the amount of force used, (3) the threat

1 reasonably perceived by prison officials, (4) any effort made to temper the forceful response, and
2 (5) the extent of the injury suffered by the inmate. *Id.* at 7. With this background and these
3 standards in mind, the court turns to the facts of this case.

4 **A. Incident of March 4, 2004, at 12:30 a.m.**

5 Defendant Dizon contends that plaintiff cannot present evidence that he used force beyond
6 that necessary to accomplish a legitimate security measure, i.e., cutting down a clothesline.
7 Plaintiff fails to demonstrate a genuine issue for trial over this incident. It is undisputed that
8 plaintiff had a clothesline across his bunk with a towel hanging from it. Such “curtains” made it
9 difficult to count prisoners because the counting guard had to ensure that a prisoner was present
10 and alive. Also, these “curtains” posed a security risk in that a prisoner behind a curtain could
11 commit some malfeasance unseen or render the officer and the inmate vulnerable to attack. In the
12 verified complaint, plaintiff alleges that Dizon flung a pocket knife at him. At deposition,
13 however, plaintiff conceded that Dizon did no such thing. Rather, Dizon cut the clothesline
14 hanging from plaintiff’s part of the bunk. Plaintiff’s concession that Dizon did not in any way
15 misuse a knife or other sharp object is fatal to this claim. He cannot prove an essential element of
16 his case, i.e., that Dizon used constitutionally excessive force. On the evidence before the court,
17 no jury could find in plaintiff’s favor on this claim. Dizon is entitled summary judgment on this
18 claim.

19 **B. Incident of March 4, 2004, at 4:30 a.m.**

20 Similarly, there is no genuine issue about whether Dizon and Powers used force
21 sadistically and maliciously for the purpose of causing harm. Plaintiff presents no evidence to
22 support this claim. It is undisputed that Dizon and Powers returned to plaintiff’s bunk at around
23 4:30 a.m. It also is undisputed that when they did, Powers cut the clothesline of plaintiff’s bunk-
24 mate just as he was required to do. In doing so, Powers shook the entire bed. While excessive
25 force directed at one prisoner can also establish a cause of action for harm that befalls other
26 prisoners, *see Robins v. Meecham*, 60 F.3d 1436, 1441-42 (9th Cir.1995), plaintiff has not

1 presented evidence to prevail on this claim. He alleges in the verified complaint that defendant
2 Dizon approached plaintiff's bunk, pointed to him and said to defendant Powers, "That's him."
3 However, plaintiff makes no connection between Dizon's words apparently directed at plaintiff
4 on the one hand, and Powers' cutting a different prisoner's clothesline on the other. Furthermore,
5 while there is evidence that Powers shook the entire bunk when he cut the clothesline, there is no
6 evidence he did so only to cause harm. *See Robins*, 60 F.3d at 1440 (recognizing that intent to
7 harm is an essential element of any excessive force claim under the Eighth Amendment). Given
8 that the "cut down tool" appears to be an awkward tool requiring some force to actually cut a
9 rope, it is not surprising that the bunk shook substantially when Powers used it. On this evidence,
10 no reasonable jury could find in plaintiff's favor on this claim this constituted a use force
11 sadistically and maliciously for the purpose of causing harm. Accordingly, Dizon and Powers are
12 entitled to judgment as a matter of law on this claim.

13 **C. Incident of March 5, 2004**

14 Again, plaintiff's allegations with respect to the events of this date are inadequate to
15 survive summary judgment. Dizon does not in his motion directly address plaintiff's detailed
16 allegations of what occurred on this date. However, plaintiff alleges that on March 5, 2004, at
17 around 12:35 a.m., Dizon and other, unidentified guards approached his bunk. Compl., at 5.
18 Plaintiff was awake, and his towel was folded and on the floor. *Id.* Nothing obscured the view of
19 plaintiff's bunk, but "Dizon walked up to my head area and shined his high-intensity flash light
20 directly into my eyes" and held a knife above plaintiff's head. *Id.* Using the hand in which he
21 was holding a knife, Dizon shook the bunk. *Id.* Dizon then went to the other side of the bunk,
22 shook the bunk with both hands, poked plaintiff in the buttocks twice and walked away. *Id.*
23 Plaintiff asserts that the second poke "penetrated the crack and cheeks" of his buttocks. *Id.*, at 6.

24 Dizon has submitted evidence that it was his practice to avoid shining his flashlight
25 directly into prisoners' eyes, but he does not deny that he did so on this particular occasion.

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1 There is evidence that in order to count a prisoner, the wing guard must be sure that the prisoner
 2 is both present and alive. However, Dizon concedes that such confirmation may be made by
 3 observing the prisoner move an arm or leg, or even by the rise and fall of the prisoner's chest as
 4 he breathes. He asserts that if a prisoner was covered in bedding, he would gently tap the bunk
 5 with his flashlight.

6 Significantly here, not every "malevolent touch by a prison guard" constitutes
 7 constitutionally excessive force. *Hudson*, 503 U.S. at 9. Thus, shaking plaintiff's bunk and
 8 shining light in his eyes do not in themselves constitute excessive force. However, for Eighth
 9 Amendment purposes, "[w]antonness does not have a fixed meaning, but rather must be
 10 determined in relation to the type of conduct on which the suit is based." *Robins*, 60 F.2d at
 11 1440. Neither does Dizon's poking plaintiff in the buttocks meet that standard.⁴ Accordingly
 12 Dizon's motion must be granted as to this claim.

13 **D. Powers' Failure to Protect Plaintiff**

14 Plaintiff alleges that Powers knew that Dizon was harassing plaintiff such that plaintiff
 15 feared substantial physical harm. Powers has not moved for summary judgment and the court
 16 does not address this claim.

17 **E. Incident of March 14, 2004**

18 Defendants Dizon, Rosales, Mendoza, Swan and Anunciacion contend that plaintiff
 19 cannot demonstrate a genuine issue with respect to whether Dizon used force "maliciously and
 20 sadistically" for the very purpose of causing harm on March 14. The court addresses this
 21 question first with respect to Dizon and then with respect to the other defendants.

22 There is a genuine issue of material fact as to this claim. It is undisputed that plaintiff left
 23 his bunk after he personally had been counted and while Dizon was leaving but still inside the

24
 25 ⁴ There can be no doubt that sexual abuse is wanton, and prisoners have a right to be free
 26 from such abuse at the hands of guards. *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir.
 2000). However, plaintiff has not alleged facts which show that this incident amounted to such
 abuse.

1 dormitory. It also is undisputed that plaintiff walked in the direction of Dizon. Dizon has
2 submitted evidence that plaintiff walked to within two feet of him, seemed agitated and disobeyed
3 two orders to stop. His evidence also shows that while he and the cover guards were still inside
4 the dormitory, a scuffle ensued between plaintiff, Dizon and Mendoza. This account contrasts
5 sharply with plaintiff's account in the verified complaint.

6 Plaintiff version of the event is that he took hold of his cane and started walking towards
7 the bathroom after the cover guards had exited the dormitory, but while Dizon was inside the
8 dormitory near the door. He alleges that when he was about 3-5 feet from the bathroom Dizon
9 ran back into the dormitory, stood by the bathroom door and commanded plaintiff to stop.
10 Plaintiff obeyed, but Dizon then told another guard to "hit his button," (presumably an alarm),
11 and grabbed plaintiff's left arm. Another (unidentified) guard grabbed plaintiff's right hand, and
12 Dizon said they should take plaintiff down in the hallway. They carried plaintiff into the hallway,
13 where Dizon hit plaintiff in the face twice, knocking off plaintiff's glasses, and grabbed plaintiff
14 around the neck. Plaintiff obeyed a different officer's order to "just relax and go down." Compl.,
15 at 10. Plaintiff states that, "Dizon then re-applied his choke hold on me as someone was kicking
16 me in the back and legs." Ultimately, Dizon released plaintiff on the command of a sergeant who
17 is not a defendant in this action. *Id.*

18 Obviously, plaintiff and Dizon provide conflicting accounts and their factual disputes are
19 material. Within these divergent versions of the events are few basic agreed-upon facts. The
20 parties agree that plaintiff left his bunk after having been counted. But they disagree about what
21 he was doing, his demeanor and the level of the security breach. Dizon contends that plaintiff
22 approached him in an agitated manner. Plaintiff maintains that he was merely walking towards
23 the bathroom. The level of security concern over this is also unclear. Plaintiff presents evidence
24 that a different prisoner regularly strolled through the dormitory during the count suggests that
25 prisoner movement was not such a serious matter. Dizon's evidence suggests that he did not
26 leave the dormitory until he and another guard removed plaintiff while attempting to subdue him.

1 Plaintiff's version is that Dizon had just left the dormitory and suddenly reentered for the sole
2 purpose of attacking plaintiff. Finally, Dizon does not deny twice hitting plaintiff or twice putting
3 plaintiff in a choke-hold. Both the need for force and the actual amount of force used are in
4 dispute. Thus, there is a genuine issue for trial about whether Dizon used excessive force against
5 plaintiff on March 14, 2004.

6 The motion on behalf of Mendoza, Rosales, Swan and Anunciacion is a different matter.
7 While Mendoza concedes that he participated in what he and Dizon characterize as an attempt to
8 restrain and subdue plaintiff, plaintiff nowhere identifies the guards who he asserts kicked him
9 and otherwise participated in Dizon's attack. Therefore, there is no particular dispute for a jury to
10 resolve with respect to Mendoza. Rosales, Swan and Anunciacion submit evidence that they did
11 not touch plaintiff on March 14. Again, plaintiff presents no evidence any of them kicked, struck
12 or otherwise harmed plaintiff that date. Therefore, there is no genuine issue for trial and their
13 motion must be granted.

14 **F. Qualified Immunity**

15 Defendants allege that they are entitled to qualified immunity. With respect to plaintiff's
16 claims of excessive force, Dizon is the only moving defendant who is not entitled to judgment as
17 a matter of law. There is no need to consider the defense of qualified immunity with respect to
18 the claims upon which the court has resolved the summary judgment motion on merits in favor of
19 defendants. *See Wilkie v. Robbins*, 127 S.Ct. 2588, 2608 (2007). Thus, the court only considers
20 whether Dizon is entitled to qualified immunity on the two claims for which he would face trial.

21 A motion for summary judgment based on the defense of qualified immunity is analyzed
22 under the ordinary framework established for such motions. *Butler v. San Diego Dist. Attorney's*
23 *Office*, 370 F.3d 956, 963 (9th Cir. 2004). A defendant who makes a properly supported motion
24 for summary judgment based on the defense of qualified immunity shifts the burden such that
25 plaintiff must produce evidence in opposition. *Butler*, 370 F.3d at 964. Thus, in resolving
26 questions of qualified immunity on summary judgment, the court must decide whether, taking the

1 undisputed facts in the light most favorable to the non-moving party, it can be said that the
2 officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If,
3 and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask
4 whether the right was clearly established . . . in light of the specific context of the case." *Id.*
5 Under the law and facts outlined above, if plaintiff's version of the events of March 14, 2004, is
6 credited, Dizon is not entitled to qualified immunity on either claim.

7 It is not necessary to recount all the facts here. There is a genuine factual dispute about
8 the amount of force used and the justification therefor. Plaintiff alleges that Dizon attacked him
9 for no reason and beat him seriously. Dizon alleges that he felt threatened and decided to subdue
10 plaintiff by taking him down. If plaintiff proves his version of events, he will be entitled to relief.
11 Thus, this claim survives the first part of the qualified immunity analysis.

12 With respect to the second prong, the court notes that the defense protects "all but the
13 plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335,
14 341 (1986). The dispositive inquiry is whether it would be clear to a reasonable guard that his
15 conduct was unlawful in the situation he confronted. *Saucier*, 533 U.S. at 205. It is not necessary
16 that the exact conduct be proscribed at the time of the acts alleged. *Hope v. Pelzer*, 536 U.S. 730,
17 739 (2002); *Mendoza v. Block*, 27 F.3d 1357 (9th Cir. 1994). Rather, the question is whether the
18 "contours of the right" have been defined at a sufficient level of specificity such that in light of
19 the pre-existing precedent, the unlawfulness of the conduct is apparent. *Anderson v. Creighton*,
20 483 U.S. 635, 640 (1987). At the time of the events giving rise to this action, the law was clear
21 that force used sadistically and maliciously for the very purpose of causing harm violated the
22 Eighth Amendment. *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

23 Dispositive of the second prong of the analysis is that the factual dispute arises in large
24 part on plaintiff's assertion that he did nothing to warrant the use of physical force in the first
25 place. As noted above, the *Whitley* standard was clearly established at the time of the events
26 giving rise to this action. Under the analysis used to apply that standard, it should go without

1 saying that although a guard need not wait to be attacked before using force, *see McCrary-El v.*
2 *Shaw*, 992 F.2d 809, 812 (8th Cir. 1993), his unprovoked assault on a prisoner violates the Eighth
3 Amendment. *See Pelfrey v. Chambers*, 43 F.3d 1034 (6th Cir.), *cert. denied*, 515 U.S. 1116
4 (1995) (allegations that guard approached inmate, who was opening his mail, with a knife and
5 restrained him and cut his hair with the knife stated claim for excessive use of force). On the
6 record presently before the court and assuming plaintiff's testimony is believed, it cannot be said
7 that a reasonable guard in the situation Dizon confronted would have believed his conduct was
8 lawful. Dizon is not entitled to qualified immunity on this claim.

9 **IV. Conclusion**

10 For the reasons explained above, the court finds that there is no genuine issue for trial with
11 respect to plaintiff's first and second claims, but there is with respect to his three other claims.
12 Furthermore, defendant Dizon is not entitled to qualified immunity. Dizon and Powers are the
13 defendants against whom plaintiff has claims for a jury to resolve.

14 Accordingly, it is hereby RECOMMENDED that:

15 1. Defendants' February 2, 2007, motion for summary judgment be granted in part and
16 denied in part as follows:

17 a. Dizon's motion for summary judgment be granted with respect to the claim that
18 he used excessive force against plaintiff at around 12:30 a.m. on March 4, 2004;

19 b. Dizon and Powers's motion for summary judgment be granted with respect to
20 the claim that they used excessive force against plaintiff at around 4:30 a.m. on March 4, 2004
21 March 5, 2004;

22 c. Dizon motion for summary judgment be granted with respect to the claim that
23 he used excessive force against plaintiff March 5, 2004;

24 d. Dizon's motion for summary judgment be denied with respect to the claims that
25 he used excessive force against plaintiff on March 14, 2004;

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1 e. Annunciacion, Barrientos, Mendoza, Rosales and Swan's motion for summary
2 judgment on the claim that they used excessive force against plaintiff on March 14, 2004, be
3 granted; and,

4 2. Plaintiff be given 30 days to file a pretrial statement, and Dizon and Powers be given
5 15 days from service thereof to file a pretrial statement.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written objections
9 with the court and serve a copy on all parties. Such a document should be captioned "Objections
10 to Magistrate Judge's Findings and Recommendations." Failure to file objections within the
11 specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158
12 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

13 Dated: March 4, 2008.

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15 EDMUND F. BRENNAN
16 UNITED STATES MAGISTRATE JUDGE
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